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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

DAVID BURNET No. 109

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

NATIONAL INDUSTRIAL ALCOHOL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MAY 9, 1930
CERTIORARI GRANTED JUNE 2, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

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NATIONAL INDUSTRIAL ALCOHOL COMPANY, INC.

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1 [Caption omitted.]

Before U. S. Board of Tax Appeals

Docket No. 4853

NATIONAL INDUSTRIAL ALCOHOL CO., Gravier & Dorgenois Streets, New Orleans, La., Petitioner

v.

COMMISISONER OF INTERNAL REVENUE, Respondent

Docket entries

1925

June 13. Petition received and filed.
" 18. Copy of petition served on solicitor.
" 18. Notification of receipt mailed taxpayer.
July 8. Answer filed by solicitor.
" 22. Copy of answer served on taxpayer. Assigned to 10/19/25.
Oct. 7. Hearing date changed to 12/1/25.
Nov. 23. Motion to extend hearing date to 1/7/26 filed by taxpayer.
" 27. Order appeal placed on general calendar. Signed & filed. Both sides notified.

1926

Sept. 1. Hearing date set Oct. 13, '26.
Oct. 13. Hearing had before Mr. Phillips on merits. Briefs due in 60 days.
Oct. 16. Transcript of hearing filed Oct. 13, 1926.
2 Dec. 13. Brief filed by G. C.
" 15. Motion for extension of time to file brief filed by taxpayer.
Dec. 16. Granted. Both sides notified.

1927

Sept. 6. Findings of fact & opinion rendered. Mr. Phillips. Decision will be entered on 15 days notice.
Nov. 7. Notice of settlement filed by G. C.
" 10. Notice allowing taxpayer until Dec. 2nd to file alternative settlement for hearing 12/8/27—failure to do so hearing set 12/6/27.
Dec. 2. Petitioner's proposed redetermination filed.
" 5. Amendment to petitioner's proposed redetermination filed.
" 8. Hearing had before Mr. Phillips on settlement. Rule 50. Assigned to Mr. Phillips.
" 12. Order of redetermination entered.
" 5. Copy of proposed redetermination served on G. C.
" 7. Copy of amended redetermination served on G. C.

1928

June 8. Stipulation of venue filed. Court of Appeals of D. C.
" 11. Supersedeas bond for $22,000.00 approved & ordered filed.

June 11. Petition for review by Court of Appeals of D. C. with assignments of error filed by taxpayer.
" 12. Proof of service filed.
Aug. 7. Motion for extension to 8/10/28 to file statement of evidence filed by taxpayer.
" 9. Order enlarging time to Sept. 12, 1928, to prepare evidence entered.
" 25. Motion for extension of 30 day- to file statement of evidence, filed by taxpayer.
" 27. Order extending time to Oct. 12, 1928, for preparation of evidence entered.
Oct. 10. Motion for extension of 30 days to file statement of evidence filed by taxpayer.
Oct. 11. Order enlarging time to Nov. 12-28 to transmit & prepare sur petition entered.
3 Nov. 7. Motion for extension of 30 days to file statement of evidence filed by taxpayer.
Nov. 8. Order enlarging time to Dec. 12th for preparation of evidence & transmission & delivery of record papers sur petition, entered.
Dec. 6. Motion for 30 days extension to file statement of evidence filed by taxpayer.
" 10. Order extending time to 1/12/29 to file statement and to 2/1/29 to file certified copies of record—entered.

1929

Jan. 5. Motion for extension of 30 days to file statement of evidence filed by taxpayer.
" 9. Order enlarging time to Feb. 12-29 for preparation of evidence further order extending time to Mar. 1-29 to file certified copies of record entered.
Feb. 12. Statement of evidence approved & ordered filed.
" 12. Præcipe filed by taxpayer.
" 14. Proof of service of præcipe filed.

Now, February 20, 1929, the foregoing docket entries certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed June 13, 1925

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his
4 deficiency letter IT:CA:2333-4-60-D, dated April 18, 1925, and as the basis of its appeal sets forth the following:

1. The taxpayer is a Louisiana corporation with principal office at Gravier and Dorgenois Streets, New Orleans.

2. The deficiency letter (a copy of which is attached) is dated April 18, 1925, but the date of mailing is not known to the taxpayer, and states a deficiency of nineteen thousand two hundred seventy-seven dollars and six cents ($19,277.06).

3. The taxes in controversy are income and profits taxes for the fiscal years ended May 31, 1919, and May 31, 1920, and are more than $10,000.00, to wit, $19,277.06.

4. The determination of tax contained in the said deficiency letter is based upon the following errors:

(1) The failure of the commissioner to allow as deductions in arriving at taxable income for both years the loss resulting from obsolescence of good will, trade-marks, and trade brands sustained as a result of prohibition legislation.

(2) The failure of the commissioner to allow as deductions in arriving at taxable income for both years losses resulting from the discard of tangible assets used in the manufacture of beer, which were rendered obsolete as a result of prohibition legislation.

5. The facts upon which the taxpayer relies as the basis of its appeal are as follows:

I. The taxpayer corporation was organized on March 25, 1911, for the purpose of manufacturing, bottling, and selling beer. Operations were commenced in April, 1911, and the business for which the corporation was originally formed continued up to June 30, 1919, the effective date of prohibition.

As a result of efforts put forth immediately after the commencement of operations in creating a value for brands adopted by them, the company was, on March 1, 1913, possessed of intangible properties consisting of the value of trade-marks, trade brands, and good will worth conservatively the sum of $106,326.40.

In addition to the value represented by their trade-marks, trade brands, and good will at March 1, 1913, there was expended in the development of the trade name "Old Heidelberg" were totally destroyed through prohi-

1917, the sum of $41,772.99.

5 The intangible values possessed by the company on March 1, 1913, and added to subsequently through direct expenditures in placing before the public the trade-mark "old Heidelberg" were totally destroyed through prohibition legislation, as the result of which the corporation on June 30, 1919, ceased the manufacture of beer and abandoned trade names theretofore used in the marketing of their product.

II. In the conduct of the taxpayer corporation's business from the date of organization until June 30, 1919, they used in the manufacture and the marketing of their product tangible properties represented in buildings, machinery, and equipment peculiarly adapted to the manufacturing and bottling of beer.

Upon the incidence of national war time prohibition on June 30, 1919, and the abandonment of the business theretofore carried on by the taxpayer corporation a very considerable portion of the building facilities and the machinery and equipment used in the business of brewing and bottling beer was discarded.

The only deduction to taxable income taken into consideration in computing the deficiency on account of the obsolescence and discard of its tangible property was the depreciated cost of bottling equipment in the sum of $24.208.84. This amount failed, however, to reflect the true loss sustained through the obsolescence and discard of tangible assets.

6. The taxpayer, in support of its appeal, relies upon the following propositions of law:

(a) Only income of a taxpayer is subject to tax.

(b) Under section 214 (a) (4) of the revenue act of 1918 the taxpayer is entitled to deduct, in arriving at taxable income, amounts representing losses sustained in his trade or business during the taxable year and not compensated for by insurance or otherwise.

(c) Under section 214 (a) (4) of the revenue act of 1918 the taxpayer is permitted to deduct, in arriving at taxable income, amounts representing a reasonable allowance for the exhaustion, wear, and tear of property used in a trade or business, including a reasonable allowance for obsolescence.

6 Wherefore the taxpayer respectfully prays that this board may hear and determine its appeal.

R. M. O'HARA,
Attorney for taxpayer,
500 Investment Building, Washington, D. C.

Duly sworn to by Charles A. Wagner; jurat omitted in printing.

TREASURY DEPARTMENT, WASHINGTON,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
IT:CA:2333-4-60-D. *April 18, 1925.*

NATIONAL INDUSTRIAL ALCOHOL COMPANY,
Gravier and Dorgenois Street,
New Orleans, Louisiana.

SIRS: The determination of your income-tax liability for the fiscal year ended May 31, 1920, pursuant to an examination of your books of account and records, as set forth in office letter dated November 4, 1924, disclosed a deficiency in tax of $19,277.06, as shown in the attached statement.

7 In accordance with the provisions of section 274 of the revenue act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the

final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CA:2333–4–60–D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.
By J. G. BRIGHT,
Deputy Commissioner.

Inclosures: Statements, agreement—Form A.

Statement

IT:CA:2333–4–60–D. APR. 18, 1925.

In re National Industrial Alcohol Company, Gravier and Dorgenois Street, New Orleans, Louisiana

Additional tax

1919	$12,457.39
1920	6,819.67
	$19,277.06

The additional tax of $19,277.06 is in accordance with the revenue agent's report dated December 29, 1923.

The commissioner has ruled that since it appears that the physical assets, real estate, buildings, and machinery and equipment have not been permanently abandoned, your claim regarding these assets does not fall under the requirements of article 143, regulations 45, which states in part:

"When through some change in business conditions the usefulness in the business of some or all of the capital assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in the business, he may claim as a loss for the year in which he takes such action, the difference between the cost or the fair market value as of March 1, 1913, of any asset so discarded (less any depreciation sustained) and its salvage value remaining. This exception to the rule requiring a sale or other disposition of property, in order to establish a loss requires proof of some unforeseen cause by reason of which the property must be prematurely discarded as, for example, where an increase in the cost of or other change in the manufacture of any product makes it necessary to abandon such manufacture to which special machinery is exclusively devoted or where new legislation directly or indirectly makes the continued profitable use of the property impossible."

Since you continued in a similar line of business subsequent to January 16, 1920, the rejection of your claim for "loss of good will" comes under the provisions of office decision 818, which states as follows:

"In the case of dealers who continued in a similar trade or business, the useful life of such intangibles is not definitely limited, although the profits may have been reduced. Therefore, liquor dealers who continued in a similar trade or business can not obtain a deduction under section 214 (a) on account of obsolescence of good will."

Consideration has been given to your amended return and to your claim for refund in the amount of $1,911.83 for the fiscal year ending May 31, 1918, and to your claim for refund for $20,825.09 for the fiscal years ending May 31, 1919, and May 31, 1920.

Your claims will be rejected in full, and will officially appear on the next schedule to be approved by the commissioner.

9 Now, February 20, 1929, the foregoing petition certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Answer

Filed Jul. 8, 1925

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

(1) Admits the allegations of paragraphs 1 and 3.

(2) Says that a deficiency letter was mailed to the taxpayer on April 18, 1925, and admits the contents of said deficiency letter.

(3) Admits the taxpayer was organized on March 25, 1911, for the purpose of manufacturing and bottling and selling beer and that it commenced operations in April, 1911.

(4) Admits that the manufacture of beer was discontinued on June 30, 1919, the effective date of war-time prohibition and that the taxpayer thereupon engaged in the business of manufacturing near beer.

(5) Denies that the good will of this corporation was destroyed on June 30, 1919, through the enactment of the prohibition legislation.

(6) For lack of sufficient information to form a belief denies the remaining allegations of Subdivision I, of paragraph 5.

(7) Admits that buildings, machinery, and equipment adapt-
10 able to the manufacturing and bottling of beer were used by this taxpayer in the conduct of his business from the date of organization.

(8) Admits that the taxpayer claimed as a deduction on account of obsolescence of tangible assets the sum of $24,208.84, representing alleged depreciated cost of bottling equipment.

(9) For lack of sufficient information, denies the remaining allegations of Subdivision II, paragraph 5.

(10) Denies that any error was made in the determination of tax as contained in said deficiency letter.

(11) Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified, or denied.

Proposition of law

This taxpayer is not entitled to a deduction representing alleged obsolescence of tangible and intangible properties on account of the enactment of prohibition legislation. Section 234 of the revenue act of 1918.

Wherefore it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for the Commissioner of Internal Revenue.

Of counsel:
BRIGGS G. SIMPICH,
Special Attorney Bureau of Internal Revenue.

Now, February 20, 1929, the foregoing answer certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

A true copy. Teste:
B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

11 Before United States Board of Tax Appeals

Docket No. 4853

NATIONAL INDUSTRIAL ALCOHOL COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Findings of fact and opinion

Promulgated Sept. 6, 1927

No deduction for the obsolescence of a trade name may be allowed. It was claimed that a valuable trade name was built up over a period of years by advertising. The cost of such advertising had been charged to expense. Held, that in the absence of any evidence

on which the cost of such advertising may be apportioned between annual expense and cost of building up a trade name, no cost has been established for the trade name and no loss is proven when its use is discontinued due to prohibition.

Deduction for obsolescence of beer vats and tanks, having no value after prohibition, allowed.

Deduction for obsolescence of portion of brewery building not allowed.

R. M. O'HARA, Esq.,
For the Petitioner.
C. H. CURL, Esq.,
For the Respondent.

The proceeding arises from the determination by the commissioner of deficiencies of $12,457.39 and $6,819.67 in income and profits taxes for the fiscal years ended May 31, 1919, and May 31, 1920. Petitioner alleges that the commissioner erred in computing net income in failing to allow any deductions in these years for losses resulting from the obsolescence of good will, trade names, and trade brand and from the discard of tangible assets used in the manufacture of beer.

Findings of fact

12 Petitioner was organized on March 25, 1911, under the laws of Louisiana, with its principal office in New Orleans, for the purpose of manufacturing, bottling, and selling beer. It adopted the trade name "Old Heidelberg" for its product and used this trade name for its beer from 1912 until November 3, 1919. Between these dates petitioner spent $30,820.62 for newspaper and souvenir advertising in the development of its business as follows:

Fiscal year ended May 31, 1913	$5,833.59
" " " " " 1914	6,200.69
" " " " " 1915	6,734.06
" " " " " 1916	7,056.05
" " " " " 1917	4,996.23
	$30,820.62

Nothing was spent for advertising after 1917. Its business consisted solely of the one product, "Old Heidelberg" beer. The amounts expended in advertising the trade name in newspapers and other advertising mediums were treated on the books of the corporation as expenses. On November 3, 1919, petitioner abandoned the manufacture of beer and the use of the trade name "Old Heidelberg" and entered upon the cereal beverage, or near-beer business. In August, 1921 petitioner began to manufacture and sell industrial alcohol, which was not made as a by-product of the near beer, but as a separate enterprise. The net profit in the fiscal year ended May 31, 1920, during six months of which petitioner manufactured beer, was $85,274.83. During the fiscal year ended May 31, 1921, the company lost money on its brewery and made a profit on its distillery. The corporation discontinued the near-beer business in 1923, but continued its distillery business.

For the manufacture of its beer, petitioner had two brick buildings separated by a driveway. Each was three storied high and of the same dimensions—100 feet by 50 feet. The walls of the brewery building were two feet thick and the walls of the cellar building were four feet thick and contained cork for insulation purposes. The foundation of the cellar building was heavier than the foundation of the brewery building. Only the cellar building had refrigeration pipes. The two buildings cost $115,348.93 in 1912. The
13 depreciated cost as of May 31, 1918, including additions, was $124,119.09. These two buildings were constructed as a complete unit.

Petitioner had both wooden and steel vats installed in the cellar building when it began to manufacture beer. There were 24 steel tanks having a capacity of 180 barrels each and 8 steel tanks having a capacity of 215 barrels each. The 24 smaller tanks were on one floor. The 8 large tanks and 50 wooden tanks were on the other two floors.

The steel vats cost $19,712, of which the twenty-four smaller tanks cost $14,083.20 and the eight larger tanks $5,628.80. The wooden tanks cost $6,486.50. Such vats were depreciated by petitioner at the rate of five per cent per annum. Actual depreciation did not exceed that amount. The building is so constructed that the steel vats could not be removed without demolishing the building. The wooden vats could be removed, piece by piece, but could not be sold for an amount sufficient to pay the cost of removing them.

After prohibition the brewery building and one floor of the cellar building were used in the manufacture of near beer. Two floors in the cellar building and the vats contained therein, consisting of the 8 large steel vats and the fifty wooden vats, were not used after November 3, 1919.

In computing net income the commissioner refused to allow any reduction for loss or obsolescence of good will, trade names, trade brands, or buildings and equipment.

Opinion

PHILLIPS: Petitioner claims a loss for the obsolescence of its good will, trade names, and trade brands. It has heretofore been held that such items are not the subject of an obsolescence deduction within the meaning of the act. Red Wing Malting Co. v. Willcuts, 15 Fed. (2nd) 626; Appeal of Manhattan Brewing Co., 6 B. T. A. 952; William Zakon v. Commissioner, 7 B. T. A. —.

We have held, however, in the last cited case that a loss may be had in the year in which such property is abandoned or becomes worthless. The difficulty here is to determine, if possible, what may be considered as the cost of a trade-mark built up by adver-
14 tising in the course of the years. From 1913 to 1917 petitioner spent $30,820.62 in advertising its one product. No doubt a part of this cost resulted in an immediate benefit to the petitioner

and was reflected in its current sales. At least, petitioner appeared to believe so, for it charged off the entire amount at once. Perhaps another part of this expenditure for advertising might be considered as creating a permanent good will. Certainly all sums spent in advertising a trade-marked product are not to be considered as the cost of the trade name. Here we meet the same situation as confronted us in the appeals of Northwestern Yeast Company, 5 B. T. A. 232, and Richmond Hosiery Mills, 6 B. T. A. 1247, being without any evidence of the basis on which the cost of advertising the product may be divided between current annual expense and the creation of a capital asset. Any apportionment we might attempt would be unsupported by evidence and would scarcely rise to the dignity of a guess. In the circumstances no deduction can be allowed. Since the petitioner has had the benefit of these deductions in computing its taxable income in the years in which the advertising took place, it does not appear that any injustice will result.

The petitioner claims that it should be entitled to a deduction in the taxable years for the discontinuance of the use of two-thirds of its cellar building and the eight steel vats and fifty wooden vats which were no longer used. The evidence is sufficient to permit a computation to be made of the depreciated cost of these items, if any deduction is proper. So far as the vats on which deduction is claimed are concerned, it appears that petitioner abandoned their use on November 3, 1919, never used them thereafter, and that they have no salvage value. In our opinion their depreciated cost may be deducted as obsolescence over the period from November 18, 1917, to January 16, 1920. Appeal of Manhattan Brewing Company, supra. We fix January 16, 1920, the effective date of the national prohibition act, as the expiration of the period rather than November 3, 1919, because it was not certain until this later date that the equipment could not again be used.

A different situation arises with respect to the building. While petitioner discontinued the use of two-thirds, there is nothing in the record to indicate that this structure was obsolete or becoming so. It is not sufficient to sustain a deduction to show only that the building can not be used in the petitioner's business. It is entirely possible that such a building was convertible for use in some other business in which refrigeration was necessary. There is no evidence that any effort was made to dispose of the building or to find any other use for it. The action of the commissioner in refusing to allow any obsolescence on the building must be approved.

Considered by MARQUETTE, MILLIKEN, and VAN FOSSAN.

Decision will be entered on 15 days' notice under rule 50.

Now, February 20, 1929, the foregoing findings of fact & opinion certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals, Division #11

Docket No. 4853

NATIONAL INDUSTRIAL ALCOHOL CO., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order of final determination

The board having heretofore, under date of September 6, 1927, promulgated its findings of fact herein and directed that decision be entered on fifteen days' notice under rule 50 and the respondent having filed its proposed recomputation of the deficiencies herein, and such proposed determination having duly come on for hearing, and the petitioner not having appeared or opposed the same, it is

Ordered and decided that upon redetermination the deficiencies in income and profits taxes for the fiscal years ending May 31, 1919, and May 31, 1920, determined by the commissioner to be
16 $12,457.39 and $6,819.67, respectively, are redetermined to be $10,220.62 and $6,141.12, respectively.

(Signed) PERCY W. PHILLIPS,
Member United States Board of Tax Appeals.

Enter. Dec. 12, 1927.

Now, February 20, 1929, the foregoing order of redetermination certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

A true copy: Teste.

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals.

Stipulation as to review

Filed June 8, 1928

It is hereby stipulated between counsel for the petitioner and counsel for the respondent that a petition for review may be filed and the decision of the Board of Tax Appeals in this proceeding reviewed by the Court of Appeals of the District of Columbia.

This stipulation is being entered into under the authority of section 1002 (d) of the revenue act of 1926.

R. M. O'HARA,
Counsel for Petitioner.
C. M. CHAREST,
Counsel for Respondent.

Dated June 8, 1928.

17 Now, February 20, 1929, the foregoing stipulation as to venue certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

In Court of Appeals of the District of Columbia

Board of Tax Appeals Docket No. 4853

NATIONAL INDUSTRIAL ALCOHOL COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review of decision of Board of Tax Appeals

Filed Jun. 11, 1928, United States Board of Tax Appeals

Now comes the above-named petitioner by its attorney, R. M. O'Hara, and respectfully represents as follows:

1. On or about April 21, 1925, the petitioner received from the Commissioner of Internal Revenue a notice dated April 18, 1925, advising the said petitioner of deficiencies in income and profits taxes as follows:

Fiscal year ended May 31, 1919	$12,437.39
1920	6,819.67

Thereafter, and within the period provided by law, petitioner filed an appeal with the United States Board of Tax Appeals, which appeal was docketed as No. 4853; the appeal was heard by the board on October 13, 1926, and a decision was rendered by the board under date of September 6, 1927. Thereafter, on December 12, 1927, the board's decision became final by the entering of its order of redetermination, by which the deficiencies were redetermined as follows:

Fiscal year ended May 31, 1919	$10,220.62
1920	6,141.12

18 2. In rendering said decision and in issuing said order of redetermination manifest errors were committed to the prejudice of the petitioner, which errors were as follows:

a. The Board of Tax Appeals erroneously held that there may not be deducted as a loss under the authority of subsection (a) of section 234 of the revenue act of 1918 any amount representing the cost to petitioner of a trade name developed by it, which trade name was abandoned on November 3, 1919.

b. The Board of Tax Appeals has erroneously held that evidence proving the cost of advertising a trade brand subsequent to March

1, 1913, does not establish the cost of such trade brand to be used in the determination of loss sustained on the abandonment of the trade brand.

c. The Board of Tax Appeals has erroneously held that no deduction from income may be allowed under the authority of subsection (a) of secion 234 of the revenue act of 1918 on account of the abandonment of two floors of a three-story building, the depreciated cost of the entire building being proven by the evidence.

Wherefore, the petitioner prays that this honorable court review the decision of the Board of Tax Appeals in this cause and grant such relief as within the discretion of the court seems justified.

R. M. O'HARA,
Counsel for Petitioner.
500 Investment Building, Washington, D. C.

Duly sworn to by R. M. O'Hara; jurat omitted in printing.

19 In Court of Appeals of the District of Columbia

[Title omitted.]

Notice of petition for review

Filed Jun. 12, 1928. United States Board of Tax Appeals

To the COMMISSIONER OF INTERNAL REVENUE.
Washington, D. C.
Attention of General Counsel, Bureau of Internal Revenue

SIR: Please take notice that I have this day filed with the clerk of the United States Board of Tax Appeals a petition for review of the board's decision in the above-entitled cause. A copy of the said petition for review is attached hereto.

R. M. O'HARA,
Counsel for Petitioner.
500 Investment Building, Washington, D. C.

Dated June 11, 1928.

Service of within notice and copy of petition referred to herein accepted this 11th day of June, 1928.

C. M. CHAREST,
General Counsel Bureau of Internal Revenue.

Now, February 20, 1929, the foregoing petition for review with proof of service certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

20 In Court of Appeals of the District of Columbia

[Title omitted.]

Statement of evidence

Filed Feb. 12, 1929. United States Board of Tax Appeals

1. The appellant, National Industrial Alcohol Company, is a corporation organized in March, 1911, under the laws of the State of Louisiana. The name of the corporation was changed in the year 1921 from National Brewing Company to National Industrial Alcohol Company.

2. The appellant kept its books and filed its income and excess profits tax returns on the basis of a fiscal year ended May 31, and the two fiscal years affected by this proceeding are the fiscal years ended May 31, 1919, and May 31, 1920.

3. The appellant was engaged in the brewery business and in the sale of its product until the date that it discontinued the manufacture of beer used as a trade name designating its product the name "Old Heidelberg." This trade name was adopted by the appellant at the very beginning of operations in 1912.

4. Certain expenses were incurred by appellant for the specific purpose of placing that trade name before the public and creating a demand for the product. The amounts of the expenses so incurred between 1912 and the effective date of prohibition were charged to expense on the appellant's books. Mr. Charles A. Wagner, president of the appellant corporation, in testifying relative to these expenses, stated as the reason for the charging of these amounts to expense that the company did not want to carry anything except tangible assets on its books, and, to be conservative, desired to write off all that they could for expenses at the time.

5. On the third day of November, 1919, the appellant ceased to produce beer and after that date did not make any use of the trade name "Old Heidelberg." The appellant thereafter entered into the cereal beverage business, but in the sale of its cereal beverage did not use the trade name "Old Heidelberg." The trade name after the third of November, 1919, was definitely abandoned.

6. Among the amounts expended between 1912 and the effective date of prohibition in developing the trade name "Old Heidelberg" were amounts expended for advertising in the form of newspaper advertising and souvenir advertising, such as fans, which were given away by appellant. All of this advertising had for its purpose the developing of the trade name "Old Heidelberg."

7. The following is an exact transcript of testimony of Charles A. Wagner, president of petitioner corporation, on cross-examination by counsel for the respondent:

Q. When were these wooden tanks put in, Mr. Wagner?

A. They were put in in 1912.

Q. In 1912?

A. Yes, sir.

Q. How long does a tank of that kind last?

A. A wooden tank?

Q. Yes, sir.

A. Oh, they should last indefinitely. I know of tanks in breweries that have been there for the last twenty or twenty-five years, and they are just as good as ever. That is, at that time, they have different wood, different from what we have to-day. I suppose the wood to-day would not last at all, because we have an experience in the distillery; we had some tanks made out of redwood, and in three years they were rotten and we had to erect steel tanks.

Q. These tanks are the ones you put in when you built the brewery?

A. Yes, sir.

Q. The steel tanks were built?

A. Yes, sir.

Q. Are they all in good shape?

A. All in good shape.

Q. You are now manufacturing near-beer?

A. Not no more; we have, but not since 1923.

Q. You were during the taxable years that we are talking about?

A. Yes, sir.

Q. What is the process—the difference in the process of manufacturing near beer and real beer?

A. The process is this, that near beer is not aged. In the first place, it is first fermented, and after fermentation takes place it creates a certain amount of alcohol; then it is reboiled and the alcohol is extracted—reboiling—some of the breweries they have a different system, but that is the system we have. We reboil it, take out the alcohol and put it back in the cellar, and then add a nonfermenting cereal to it, because after that beer is dealcoholized it does not taste like any thing, so, in order to give it what we call full-mounted, they use a nonfermenting syrup to mix with it to make it taste like something.

Q. So you go through practically the same process, outside of the ageing in the first instance, that you did in making the real beer?

A. Practically, but the expense is double, because we have to go all over it again, you must make it twice; you first make the real beer, dealcoholize it, and then make near beer out of that.

Q. Why does not that take as much capacity as making the real beer?

A. Because, in the first place, we did not sell but about one-third as much as real beer, and in the next place you do not have to age it at all—you can make near beer to-day and sell it to-morrow if you want to—it does not need any ageing.

Q. Your profits on the near beer are greater than they were on the Heidelberg, is not that true?

A. They were less if you sell it at the same price, because you have to brew the beer over twice—the manufacturing expense is double.

Q. But you sold much more of it than you did real beer; is not that true?

A. No, sir.

Q. Is it not a fact that your profits in 1919 and 1920 were greater than they were in 1918?

A. Not in 1920; up to November, 1919, you might say,
23 October, 1919; after that it dropped down to nothing, which we can prove from the books.

Q. Did you have any other income, other than what you made from near beer—the corporation?

A. We did not; we ate up our surplus; that is what we did.

Mr. CURL. Mr. O'Hara, are you willing that the returns for these various years shall go in without formality?

Mr. O'HARA. Yes.

By Mr. CURL:

Q. I just want you to look at that, Mr. Wagner, and see what that paper purports to be?

A. I could not answer this at all, because I am not a bookkeeper.

Q. Is not that your income-tax return for 1918?

A. I have our auditor here who can answer this question for me.

Q. I think you can answer.

A. Well, I guess I can.

Q. You can read that first line there and tell me what it is. What is your net income for the pre-war years—that is the figure that is given?

A. That is 49.

Q. $49,000, is it not?

A. Yes, sir.

Q. Now, then, what is your net income as shown by this return, Mr. Wagner.?

A. Is that for 1919?

Q. Yes, sir.

A. That is correct.

Q. $84,000, is it not?

A. Yes, sir; but we sold beer up to November 3rd of that year.

Q. You sold beer up to November 3d?

A. Yes, sir.

Q. All right, let us look at 1920.

Mr. O'HARA. I should like to have you clear your question to this extent; you had him identify that return for the year 1920, did you not?

Mr. CURL. 1919.

Mr. O'HARA. I think it should be brought out that it was the fiscal year.

Mr. CURL. Is it fiscal year?

Mr. O'HARA. Yes, sir.

By Mr. CURL:

Q. Do you remember, Mr. Wagner, what your income for 1920 was, the fiscal year ending May, 1920?

A. I think the books show $85,243.

24 Q. In how much of that year did you still sell real beer?

A. 1920?

Q. Yes.

A. We did not sell no real beer.

Q. This is the fiscal year from June 1st; you had a few months in there of the real beer then?

A. Yes.

Q. You ceased selling real beer on November 3rd?

A. Our fiscal year ends in May; we had from June 1st to October 3rd—six months. We had real beer at that time; that is right.

* * * * * * *

8. In 1921 the company sustained a loss on operations of $38,415.75.

9. All of the money that the company spent on "Old Heidelberg" was charged to expense and applied by it as a deduction on its various income tax returns.

10. During the period from the commencement of business operations to May 31, 1917, the advertising expenditures incurred and charged on the books of the company to expense under the heading of "advertising" were as follows:

Fiscal year ended May 31,	1913	$5,833.59
	1914	6,200.69
	1915	6,734.06
	1916	7,056.05
	1917	4,996.23

11. This money that was spent for advertising was only to promote the trade-mark "Old Heidelberg." "Heidelberg" was all that the company put out. In advertising Heidelberg the company was advertising its entire business. The company advertised Heidelberg as the Pabst people advertised "Blue Ribbon." Its general advertising scheme was to promote the sales of its product. The cost of that advertising was charged to expense on the company's books.

12. The appellant owned two buildings, one being known as the main building, which contained the brew house, the sut house, and the engine room or boiler room, and the other being known as the cellar building, containing three floors, two of which were

25 abandoned when the company went from real to near beer, on November 3, 1919, to save refrigeration; it was necessary to keep the cellars cold for beer but not for near beer, so the company abandoned two floors, shut them up, and used only the lower cellar. It did not need all of the one floor, but to partition it off would have involved expense, but the first floor was more than ample to take care of the business. After November, 1919, the company used the refrigeration plant only on the one floor. These floors contained vats or tanks for the fermentation and the ageing of beer. The appellant

discontinued the cereal beverage business entirely in the year 1923 and at that time discontinued the use of the remaining floor of the cellar building and of the vats contained there.

13. In August, 1921, appellant started in the distillery business, producing industrial alcohol. Industrial alcohol is not a by-product of near beer, but was produced by appellant on separate premises and in a plant that is entirely separate. Neither of the two buildings designated as the main building and the cellar building was used by appellant in the industrial alcohol business.

14. No use whatsoever was made of the vats on the two floors of the cellar building after the effective date of prohibition. Neither those tanks nor those two floors in the cellar building have ever had any value to the company since prohibition, but the tanks were allowed to remain in the building. Charles A. Wagner, president of the appellant corporation, in response to a question as to whether or not the tanks had salvage value, stated that he did not think they had enough salvage value to remove them, because to remove the steel tanks it would be necessary to dismantle the cellar to get them out, the doors being only six feet wide and the steel tanks twenty-two feet in diameter.

15. The total cost of the main building and the cellar building at May 31, 1917, after deducting depreciation prior to that date
26 was $124,119.09. The depreciation deducted by appellant on those two buildings for the fiscal years 1918, 1919, and 1920 was as follows:

Fiscal year ending May 31, 1918	$2,172.08
1919	3,104.77
1920	3,102.98

16. The main building and the cellar building were constructed alike except that the cellar building was more heavily constructed.

17. Each of the two buildings was 100 feet by 50 feet, thereby covering the same area, was of the same height and of the same general type of construction. The differences in construction were that the walls of the cellar building were thicker and were insulated, whereas there was no insulation in the brewery building. The walls of the cellar building were four feet thick and of the main building or brewery building two feet thick. The foundation of the cellar building was heavier than that of the brewery building because of the weight that it had to carry. The cellar building was equipped with refrigerating pipes, there being no refrigerating pipes in the brewery building.

18. The operations of the appellant in the fiscal years 1919, 1920, and 1921 resulted as follows:

Fiscal year ended—	
May 31, 1919—net income	$84,000.00
1920—net income	85,243.00
1921—net loss	38,415.75

19. During the fiscal year ended May 31, 1920, in which the appellant realized a net income of $85,243.00 the appellant was

producing beer over the period from June 1, 1919, to November 3, 1919.

20. The above and foregoing statement of evidence contains in narrative form the substance of all of the evidence introduced before the board material to a consideration of the errors assigned in the petition for review.

(S.) R. M. O'HARA,
Counsel for Appellant.

(S.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

27 Approved Feb. 12, 1929.

PERCY W. PHILLIPS,
Member U. S. Board of Tax Appeals.

Now, February 20, 1929, the foregoing statement of evidence certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Præcipe for transcript of record

Filed Feb. 12, 1929

Now comes the petitioner by its counsel and asks that the clerk of the Board of Tax Appeals prepare and transmit, in accordance with rule 51, to the Court of Appeals of the District of Columbia, as the record in this proceeding, copies duly certified as correct of the following entries, records, documents, and other papers:

1. Docket and list of all proceedings in the above-entitled appeal.
2. Petition.
3. Answer.
4. Findings of fact and opinion of Board of Tax Appeals.
5. Order of redetermination.
6. Stipulation as to venue, dated June 8, 1928.
7. Petition for review.

28 8. Statement of evidence.

9. Præcipe.

R. M. O'HARA,
Counsel for Appellant,
500 Investment Building, Washington, D. C.

Dated February 12, 1929.

Now, February 20, 1929, the foregoing præcipe certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Order enlarging time

On motion of counsel for the petitioner, it is

Ordered that the time for preparation of evidence and transmission and delivery of record papers sur petition for review of the above-entitled proceeding in the Court of Appeals of the District of Columbia be and is hereby extended to September 12, 1928.

(Signed) JOHN M. STERNHAGEN,
Member U. S. Board of Tax Appeals.

Dated Washington, D. C., August 9, 1928.

A true copy. Teste:
[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE, *Clerk.*
B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

29 Before United States Board of Tax Appeals

[Title omitted.]

Order enlarging time

On motion of counsel for the petitioner, it is

Ordered that the time for preparation of evidence and transmission and delivery of record papers sur petition for review of the above-entitled proceeding in the Court of Appeals for the District of Columbia be, and it is hereby, extended to October 12, 1928.

(Signed) JOHN M. STERNHAGEN,
Member United States Board of Tax Appeals.

Dated Washington, D. C., August 27, 1928.

A true copy. Teste:
[Seal United States Board of Tax Appeals, 1924.]

B. D. GAMBLE, *Clerk.*
B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Order enlarging time

On motion of counsel for the petitioner, it is

Ordered that the time for preparation of evidence and trans-
30 mission and delivery of record papers sur petition for review

of the above-entitled proceeding in the Court of Appeals for the District of Columbia be, and it is hereby, extended to November 12, 1928.

(Signed) B. H. LITTLETON,
Member United States Board of Tax Appeals.

Dated Washington, D. C., October 11, 1928.
A true copy. Teste:
[Seal United States Board of Tax Appeals, 1924.]
B. D. GAMBLE, *Clerk.*
B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Order enlarging time

On motion of counsel for the petitioner, it is
Ordered that the time for preparation of evidence and transmission and delivery of record papers sur petition for review of the above-entitled proceeding in the Court of Appeals for the District of Columbia be, and it is hereby, extended to December 12, 1928.

(Signed) B. H. LITTLETON,
Member United States Board of Tax Appeals.

Dated Washington, D. C., November 8, 1928.
A true copy. Teste:
[Seal United States Board of Tax Appeals, 1924.]
B. D. GAMBLE, *Clerk.*
B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

31 Before United States Board of Tax Appeals

[Title omitted.]

Order enlarging time

On motion of counsel for the petitioner, it is
Ordered that the time for preparation of the evidence sur petition for review in the above-entitled proceeding in the Court of Appeals, District of Columbia, be and it is hereby extended to January 12, 1929; and it is further
Ordered that the time for filing certified copies of the record be extended to February 1, 1929.

(Signed) B. H. LITTLETON,
Member United States Board of Tax Appeals.

Dated Washington, D. C., December 10, 1928.
A true copy. Teste:
[Seal United States Board of Tax Appeals, 1924.]
B. D. GAMBLE, *Clerk.*
B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Order enlarging time

On motion of counsel for the petitioner, it is

Ordered that the time for preparation of the evidence sur
32 petition for review in the above-entitled proceeding in the Court of Appeals, District of Columbia, be and it is hereby extended to February 12, 1929; and it is further

Ordered that the time for filing certified copies of the record be extended to March 1, 1929.

(Signed) B. H. LITTLETON,
Member United States Board of Tax Appeals.

Dated Washington, D. C., January 9, 1928.

A true copy. Teste:

[Seal United States Board of Tax Appeals, 1924.]

B. D. GAMBLE, *Clerk.*
B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[File indorsement omitted.]

33 In Court of Appeals of the District of Columbia

NATIONAL INDUSTRIAL ALCOHOL COMPANY, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

No. 4929

Motion for revival and substitution of Robert H. Lucas as party respondent

Now comes the appellant by its attorney, R. M. O'Hara, and moves this honorable court for a revival of this action, which was instituted against David H. Blair as Commissioner of Internal Revenue, so that the action will be pending against Robert H. Lucas as Commissioner of Internal Revenue, and further moves for the substitution of the said Robert H. Lucas as Commissioner of Internal Revenue for David H. Blair, formerly Commissioner of Internal Revenue.

There is being filed simultaneously herewith a stipulation signed by counsel for the parties consenting to such a revival and substitution and waiving service of notice of this motion.

R. M. O'HARA,
Counsel for Appellant,
500–4 Investment Building, Washington, D. C.

Dated November 13, 1929.

[Title omitted.]

Stipulation for revival and substitution of Robert H. Lucas as party respondent

Filed Nov. 13, 1929

It is hereby stipulated and agreed by and between the petitioner in the above-entitled cause and Robert H. Lucas, as Commissioner of Internal Revenue, through their respective attorneys, as follows:

That since the filing of the petition for review in the above-entitled cause David H. Blair, who was at that time Commissioner of Internal Revenue and who was the respondent at that time in the above-entitled cause, and had been Commissioner of Internal Revenue since the appeal was originally filed in the United States Board of Tax Appeals at Washington, D. C., has resigned as said Commissioner of Internal Revenue, and his resignation has been duly accepted;

That David H. Blair ceased to be Commissioner of Internal Revenue on the 31st day of May, 1929;

That Robert H. Lucas was duly appointed as Commissioner of Internal Revenue to succeed the said David H. Blair, and has duly qualified as said Commissioner of Internal Revenue;

That on June 1, 1929, said Robert H. Lucas became Commissioner of Internal Revenue, and ever since that time has been, and now is, Commissioner of Internal Revenue.

It is further stipulated and agreed between the petitioner in the above-entitled cause and Robert H. Lucas, as Commissioner of Internal Revenue, through their respective attorneys, that agreeably to this court, and in accordance with the law, this cause may be revived so that this action will be pending against the said Robert H. Lucas, as Commissioner of Internal Revenue, and that said Robert H. Lucas, as Commissioner of Internal Revenue, may be substituted as the respondent in this cause for the said David H. Blair, formerly Commissioner of Internal Revenue.

35 That there is substantial need for so continuing and maintaining this cause, because if it is not so continued and maintained the order of the United States Board of Tax Appeals, for the review of which the petition for review in this cause was filed, will become final; the tax found by the said Board of Tax Appeals to be due will be assessed and collected from this petitioner without recourse to further contest its legality or obtain a refund thereof.

It is further stipulated and agreed by and between the petitioner in the above-entitled cause and Robert H. Lucas, as Commissioner of Internal Revenue, through their respective attorneys, that the service of notice of the motion to revive this action in the name of Robert

H. Lucas, as Commissioner of Internal Revenue and to have his name substituted as respondent in this cause, is hereby waived, and the said Robert H. Lucas, as Commissioner of Internal Revenue, by and through his attorney, consents than an order may be made forthwith by the court reviving this cause in the name of Robert H. Lucas, as Commissioner of Internal Revenue, and substituting him as respondent in this cause for the former Commissioner of Internal Revenue, David H. Blair.

R. M. O'HARA,
Attorney for Petitioner.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Robert H. Lucas, as
Commissioner of Internal Revenue.

[File indorsement omitted.]

36, 37 [Minute entries of argument and submission, Nov. 13, 1929, omitted in printing.]

38 In Court of Appeals of District of Columbia

[Title omitted.]

Order substituting Robert H. Lucas as party respondent

Nov. 14, 1929

On motion filed herein, it is ordered by the court that Robert H. Lucas be, and he is hereby, substituted for David H. Blair as Commissioner of Internal Revenue in the above-entitled cause.

39 In Court of Appeals of the District of Columbia

No. 4929

NATIONAL INDUSTRIAL ALCOHOL COMPANY, APPELLANT

vs.

COMMISSIONER OF INTERNAL REVENUE

Appeal from the Board of Tax Appeals

Before MARTIN, Chief Justice; ROBB and VAN ORSDEL, Associate Justices

Opinion

Filed Feb. 4, 1930

VAN ORSDEL, Associate Justice.

This appeal is here from a decision of the United States Board of Tax Appeals in a case involving income and profits taxes for the fiscal years ending May 31, 1919, and May 31, 1920.

Appellant company was engaged in the brewery business in New Orleans, Louisiana, from March, 1901, to November 3, 1919. It adopted as a trade name for beer "Old Heidelberg." It spent in newspaper and souvenir advertising after March 1, 1913, the sum of $24,987.03, which was treated as ordinary expenses and deducted from gross income reported on its income tax returns.

On November 3, 1919, appellant abandoned the manufacture of beer and the use of its trade name, and entered upon the business of manufacturing near beer. In August, 1921, appellant began the manufacture and sale of industrial alcohol, which was not made as a by-product of the near beer, but as a separate product. In 1923 the near-beer business was discontinued.

In connection with the manufacture of beer, appellant had two brick buildings separated by a driveway. Each was of the same dimensions—three stories high, 50 x 100 feet. The walls of the brewery building were 2 feet thick, and the walls of the cellar building were 4 feet thick and contained cork for insulation purposes. This building was equipped with refrigeration pipes. The buildings in 1912 cost $115,348.93 and possessed a depreciated cost on May 31, 1918, including additions, of $124,119.09. The two buildings were constructed as a unit to be used in connection with the manufacture of beer. When the manufacture of beer was discontinued, following the adoption of prohibition, the brewery building and one floor of the cellar building were used in connection with the manufacture of near beer. The two upper floors of the cellar building and the vats therein, consisting of eight large steel vats and fifty wooden vats, were not used after November 3, 1919.

This case arose as the result of the commissioner's disallowance of the amounts expended in advertising and souvenirs, which were claimed by appellant as deductions on account of the abandonment of its trade name, and for an additional amount claimed for obsolescence or loss in connection with the two floors of the cellar building.

From the affirmance of the commissioner's findings by the board this appeal was taken.

It was stated in the opinion of the board that "petitioner claims a loss for the obsolescence of its good will, trade names, and trade brands. It has heretofore been held that such items are not the subject of an obsolescence deduction within the meaning of the act." This is true as to good will. A claim for loss of good will as the result of the termination of appellant's brewery business by prohibition legislation was properly refused by the commissioner. Good will is not of that class of intangible property which can be made the basis of income-tax reduction unless it can be shown that the loss resulted from a sale of property for a depreciated value.

In Red Wing Malting vs. Willcuts, 15 Fed. (2d) 626, it was held that the loss of good will of a malting company as the result of prohibition can not be a basis for deduction of income tax under the revenue act of 1918. After an exhaustive review of the subject

the court said: "We have heretofore pointed out that good will has no existence separate and apart from an established business. With the termination of that business it is ended. While a capital asset,
it is not the subject of purchase, sale, or assignment separate
41 from the business itself. It is not an assignable asset distinct
from the business. It is different in this respect from such intangibles as patents, contracts, or franchises which may be sold. When a business is disposed of, its value and realized selling price may be enhanced by the existence of good will. If sold at a loss, the loss of good will is reflected in the transaction. The claim is somewhat novel, therefore, and rather startling, that loss of good will can be made the subject of an independent claim for a tax deduction, separate and distinct from the business of which it is an incident. * * * To hold that a claimant is entitled to segregate good will from the property and business to which it is attached as an incident, and from which it is inseparable, and permit a separate deduction for its loss, might result in a double deduction and have far-reaching consequences. If the court is to open the door to claimants for tax deductions under the statute for the loss of good will apart from the tangible property with which it is connected, the right should clearly appear from the statute. We think it does not so appear."

On the other hand, it has been held by the board that loss sustained from the abandonment of a trade name is properly deductible in the year in which the abandonment occurs; but it held that the difficulty encountered in the present case arises from the failure of the appellant to identify the expenditures making up the cost of establishing the trade name. Undoubtedly a very large part of the expense incurred in advertising and souvenirs since 1913 resulted in the advancement of sales during the respective years, and as such was purely a business expense chargeable against the current income, as was done by appellant in respect of the entire amount so expended.

In the case of Richmond Hosiery Mills vs. Commissioner of Internal Revenue, 29 Fed. (2d) 962, where the petitioner sought to restore to its capital account as invested capital a large amount expended in advertising a brand of hosiery under the trade name of "Wunderhose," which it had adopted and copyrighted, the court
affirmed the finding of the board to the effect that while a sub-
42 stantial part of the advertising of the trade brand undoubtedly produced immediate benefits, it was unable from the showing made to segregate the sums expended as between capital and expense. On this point the court said: "No effort was made to have an expert audit the books to determine what proportion of the amount expended for advertising should be allocated respectively to expense and capital account. It is certain that some part, and probably the larger part, should be considered as an expense, and much weight is given to this conclusion by the charging of the total amount of expense initially."

In this case, as in that, the appellant has failed to sustain the burden of showing with reasonable certainty the amount chargeable to capital account, and, having charged the total amount to expense and made deductions accordingly, we agree with the board that there is nothing before us upon which we can determine what amount can properly be attributed to the value of the trade name.

We come now to the consideration of the claim of appellant for his loss sustained through the abandoned use of the two floors of the cellar building. It appears from the evidence that to remove the steel vats from the two floors would require the dismantling of the cellar building, the doors being only 6 feet wide and the vats 22 feet in diameter. In support of appellant's contention that the two abandoned floors possessed no residual or salvage value, but represented a total loss, we think the evidence is ample. In determining this point the nature of the building and the purpose of its construction must be taken into consideration. The building was designed for the brewery business alone, with walls 4 feet thick, insulated, and equipped with refrigerating pipes, in which was installed at the time of building the steel and wooden vats. The testimony shows that neither the two floors abandoned nor the vats on those floors had any value to appellant after November 3, 1919. The only use made of the building subsequent to that time was the use of the first floor until 1923 for the manufacture of a cereal beverage. To establish a loss, it is not essential that the
43 fact or amount of the loss be determined by a sale of the property. Dean, Collector, vs. Hoffheimer Brothers Company, 29 Fed. (2d) 668. "A loss may become complete enough for deduction without the taxpayer's establishing that there is no possibility of an eventual recoupment. * * * The taxing act does not require the taxpayer to be an incorrigible optimist." U. S. vs. S. S. White Dental Mfg. Co., 274 U. S. 398.

It is not for the commissioner or the board to speculate as to the future use that may possibly be made of the property, or the value it may attain when so used, in the face of proof, as in this case, that the entire value to appellant ceased with the outlawing of his brewery business. We are of opinion, therefore, that appellant is entitled to deduction for the loss sustained to the extent of the value of the two floors, together with the depreciated value of the vats therein contained.

The decision of the board is affirmed as to good will and trade name, and reversed as to allowance for loss of building.

[File indorsement omitted.]

44 In Court of Appeals of District of Columbia

NATIONAL INDUSTRIAL ALCOHOL COMPANY, appellant vs. ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE	No. 4929. January term 1930

Judgment

Feb. 4, 1930

Appeal from the Board of Tax Appeals. This cause came on to be heard on the transcript of the record from the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decision of the said Board of Tax Appeals in this cause be and the same is hereby affirmed as to good will and trade name, and reversed as to allowance for loss of building.

Per Mr. JUSTICE VAN ORSDEL.

45–47 [Motion for rehearing covering 3 pages, filed Feb. 18, 1930, omitted from this print. It was denied and nothing more by order Mar. 1, 1930.]

48–51 [Brief in opposition to motion for rehearing, covering 4 pages, filed Feb. 26, 1930, omitted in printing.]

52 In Court of Appeals of District of Columbia

[Title omitted.]

Order denying motion for rehearing

Mar. 1, 1930

On consideration of the motion for rehearing, reargument, and to modify judgment in the above-entitled cause, it is ordered by the court that said motion be and the same is hereby denied.

53 In Court of Appeals of the District of Columbia

[Title omitted.]

Motion to withdraw mandate

Filed Mar. 5, 1930

Now comes the Commissioner of Internal Revenue, the respondent herein, by his attorney, C. M. Charest, General Counsel Bureau of Internal Revenue, and moves the court to withdraw its mandate heretofore issued herein.

In support of this motion the said Commissioner of Internal Revenue respectfully shows to the court that he is considering the advisability of filing in the Supreme Court of the United States a petition for certiorari in this cause, that it is quite possible that such petition for certiorari will be filed, and that he believes it to be undesirable under such circumstances to have outstanding the mandate of this court.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

54 [File indorsement omitted.]

55 In Court of Appeals of the District of Columbia

[Title omitted.]

Order denying motion to withdraw mandate

Mar. 8, 1930

On consideration of the motion to recall and stay the mandate in the above-entitled cause, it is ordered by the court that said motion be and the same is hereby denied.

56 [Clerk's certificate to foregoing transcript omitted in printing.]

57 In Supreme Court of the United States

Order allowing certiorari

Filed June 2, 1930

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted, and the case is advanced and assigned for hearing immediately following No. 741, Lucas, Commissioner of Internal Revenue, vs. Niagara Falls Brewing Company et al.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 35018. District of Columbia, Court of Appeals. Term No. 109. Robert H. Lucas, Commissioner of Internal Revenue, petitioner, vs. National Industrial Alcohol Company, Inc. Petition for writ of certiorari and exhibit thereto. Filed May 9, 1930. File No. 35018.

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No. ~~882~~ 109

In the Supreme Court of the United States

OCTOBER TERM, 1929

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

NATIONAL INDUSTRIAL ALCOHOL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. ——

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

NATIONAL INDUSTRIAL ALCOHOL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General on behalf of the Commissioner of Internal Revenue prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia rendered in the above-entitled cause (R. 39, 44), reversing in part the decision of the United States Board of Tax Appeals.

STATEMENT

This case reached the Court of Appeals of the District of Columbia, on the petition of the National Industrial Alcohol Company, respondent,

for a review of the decision of the United States Board of Tax Appeals determining deficiencies in respondent's income and profits taxes for the fiscal years ended May 31, 1919, and May 31, 1920.

The material facts are not in dispute, and may be briefly stated as follows (R. 11):

The respondent, a Louisiana corporation, organized in 1911, and having its principal office in New Orleans, Louisiana, was engaged in the brewery business. On November 3, 1919, respondent abandoned the manufacture of beer and entered upon the cereal beverage business. This business was discontinued in 1923.

For the manufacture of beer, respondent used two brick buildings, separated by a driveway. Each building was three stories high and of the same dimensions, 100 feet by 50 feet. The walls of the brewery building were two feet thick, and the walls of the so-called cellar building were four feet thick and insulated with cork. The foundation of this building was also heavier than that of the brewery building. The cellar building only contained refrigeration pipes. The depreciated cost of the two buildings and additions as of May 31, 1918, was $124,119.09. They were constructed as a complete unit. After prohibition went into effect, the brewery building and one floor only of the cellar building were used for manufacturing the cereal beverage. Two floors of the cellar building, and fifty-eight large vats therein contained, were

not used after November 3, 1919. The vats were either constructed of such material or so constructed as to render their removal impossible or impracticable.

The Commissioner of Internal Revenue disallowed deductions claimed by the respondent for losses due to the abandonment of the beer vats and the two floors of the cellar building. The respondent appealed to the United States Board of Tax Appeals, which affirmed the Commissioner's action with the exception of his disallowance of the depreciated value of the abandoned vats, which the Board held was deductible on account of obsolescence over the period from November 18, 1917, to January 16, 1920, the date which the Board found to be the date on which it became certain these vats could not again be used by the respondent. (R. 14.) The respondent filed its petition for a review of the decision of the Board of Tax Appeals, electing to stipulate with counsel for the Commissioner of Internal Revenue that, pursuant to Section 1002 (d) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 110 (U. S. C. App., Title 26, Sec. 1225), the review might be had in the Court of Appeals of the District of Columbia. (R. 16, 17.)

On February 4, 1930, the Court of Appeals of the District of Columbia rendered its decision (R. 35) reversing the Board's decision with respect to the losses claimed by respondent to be due to the abandonment of the two floors of the cellar building.

Timely motion for rehearing and modification of this judgment was filed by the petitioner herein on February 18, 1930 (R. 39), and denied by the court on March 1, 1930 (R. 44). On the same day the court issued its mandate to the Board of Tax Appeals directing a recomputation of the tax in accordance with its opinion. Petitioner herein moved the court to recall its mandate. This motion was denied on March 8, 1930. (R. 45.)

SPECIFICATION OF ERROR TO BE URGED

The court below erred in holding that, where tangible assets are abandoned because the business in which they are used is proscribed by prohibition legislation, a taxpayer may deduct from income any amount as a loss of such assets under Section 234 (a) (4) or Section 234 (a) (7) of the Revenue Act of 1918.

REASONS FOR GRANTING THE WRIT

1. The decision in the present case is in conflict with and contrary to the decisions of this Court.

In *Clarke* v. *Haberle Crystal Springs Brewing Co.,* 280 U. S. 384, this Court denied the taxpayer the right to deduct any amount from income under the provisions of Section 234 (a) (7) of the Revenue Act of 1918, for "exhaustion, including obsolescence, of its good will," on the ground that when a business is extinguished as noxious under the Constitution the owners can not demand compensation from the Government, or a partial

compensation in the form of an abatement of taxes otherwise due. This ruling is equally applicable to loss in the value of tangible property caused by the enforced abandonment of its use in the prohibited business.

In *Renziehausen* v. *Lucas,* 280 U. S. 387, a claim for deductions on account of obsolescence of good will of a distilling business, resulting from prohibition legislation, was denied on the basis of the decision in the *Haberle Brewing Company case.*

2. On April 28, 1930, this Court, on the petition of the Commissioner of Internal Revenue, granted its writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Second Circuit, in the case of *Lucas* v. *Niagara Falls Brewing Co.,* No. 741, October Term, 1929. In that case the Circuit Court of Appeals, relying upon its decision in *Haberle Crystal Springs Brewing Co.* v. *Clarke,* 30 F. (2d) 219, allowed a deduction for obsolescence of tangible property used in a business extinguished by national prohibition. In the case at bar, the respondent claimed the deduction either as obsolescence under Section 234 (a) (7), or as a loss under Section 234 (a) (4). The claim under Section 234 (a) (7) will be disposed of by this Court when the *Niagara Falls Brewing Company case* is reviewed.

3. The question is of present importance in administering the Federal income tax laws since it is involved in cases now pending in the courts, the

Board of Tax Appeals, and the Bureau of Internal Revenue. Without a decision of this Court, the Commissioner of Internal Revenue is unable to determine the proper principle to be applied in such cases, and acceptance of the decision in the present case would leave the matter in confusion. Although the Commissioner believes that this Court has announced in the *Haberle Brewing Company case, supra,* the proper principle to be applied in such cases, whether involving tangible or intangible property, confusion results from the fact that in the cited case the sole question was whether deductions could be allowed for obsolescence of intangible property.

Wherefore, it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

MAY, 1930.

BRIEF IN SUPPORT OF PETITION

OPINION BELOW

The opinion of the Court of Appeals of the District of Columbia (R. 35) is not yet reported. The findings of fact and opinion of the United States Board of Tax Appeals (R. 11–15) are reported in 7 B. T. A. 1241.

JURISDICTION

The decision of the Court of Appeals of the District of Columbia, reversing the Board of Tax Appeals, was rendered February 4, 1930. (R. 35.) Motion for rehearing, filed February 18, 1930, was denied March 1, 1930. (R. 44.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The sole question herein presented is whether the abandonment of tangible property constitutes an allowable deduction as a loss under Section 234 (a) (4) or as obsolescence under Section 234 (a) (7) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, 1078, when such abandonment is directly attributable to the proscription of the taxpayer's business by virtue of the Eighteenth Amendment to the Constitution of the United States and national legislation enacted pursuant thereto.

STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, 1078:

> SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> * * * * *
>
> (4) Losses sustained during the taxable year and not compensated for by insurance or otherwise.
>
> * * * * *
>
> (7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.
>
> * * * * *

STATEMENT

The facts are sufficiently stated in the petition for certiorari.

ARGUMENT

The court below holds that, since it appears that the respondent herein ceased the manufacture of beer on November 3, 1919, because of national prohibition, and abandoned the use of two floors of its cellar building, the value of those two floors constitutes a loss deductible from gross income, since that portion of the building had no value to respondent from the date of abandonment on November 3, 1919, and the entire value to respondent of those abandoned floors ceased with the outlawing of its brewing business. The authorities relied upon by

the court for this position are the cases of *Dean* v. *Hoffheimer Bros. Co.,* 29 F. (2d) 668, and *United States* v. *White Dental Co.,* 274 U. S. 398. Neither of these cases treats the issue here raised from the viewpoint of the deductibility of a loss resulting from legislative proscription of the taxpayer's business, and both of the cited cases were decided prior to the decisions of this Court in the cases of *Clarke* v. *Haberle Crystal Springs Brewing Co.,* 280 U. S. 384, and *Renziehausen* v. *Lucas,* 280 U. S. 387, in which this Court ruled upon a deduction claimed for obsolescence of intangible property rendered obsolete or obsolescent by prohibition legislation. In the former case this Court said (p. 386):

> * * * when a business is extinguished as noxious under the Constitution the owners can not demand compensation from the Government, or a partial compensation in the form of an abatement of taxes otherwise due.

This principle is equally applicable to deductions claimed because of the abandonment or obsolescence of tangible property used in a business which is extinguished as noxious under the Constitution. It is submitted that the foregoing cases are controlling in the instant case, and that no deductions from gross income representing losses or obsolescence of tangible property arising out of or consequential upon the enactment of national prohibition are lawfully allowable.

It is respectfully submitted that the decision of the Court of Appeals of the District of Columbia is

in conflict with the decisions of this Court, and leaves in grave doubt the proper course to be followed by the Commissioner of Internal Revenue in disposing of pending cases involving the question herein.

CONCLUSION

In order that there may be a conclusive determination of an important principle involved in the administration of the Federal income tax laws, it is urged that this petition be granted.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
SEWALL KEY,
JOHN G. REMEY,
Special Assistants to the Attorney General.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.
ROBERT L. WILLIAMS,
Special Attorney,
Bureau of Internal Revenue.

MAY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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No. 109

In the Supreme Court of the United States

OCTOBER TERM, 1930

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

NATIONAL INDUSTRIAL ALCOHOL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 109

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

NATIONAL INDUSTRIAL ALCOHOL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

OPINIONS BELOW

The findings of fact and opinion of the United States Board of Tax Appeals (R. 8–10) are reported in 7 B. T. A. 1241.

The opinion of the Court of Appeals of the District of Columbia (R. 24–27) is reported in 38 F. (2d) 718.

JURISDICTION

The judgment of the Court of Appeals of the District of Columbia, reversing in part the decision

of the Board of Tax Appeals, was entered February 4, 1930. (R. 28.) Rehearing was denied March 1, 1930. (R. 28.) Petition for a writ of certiorari was filed May 9, 1930 (R. 29), and granted by this Court on June 2, 1930 (281 U. S. 717).

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Did Congress intend by Section 234 (a) (4) or Section 234 (a) (7) of the Revenue Act of 1918 to authorize a deduction for obsolescence or loss in value of tangible property caused by prohibition legislation?

STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, 1078:

> SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> * * * * *
>
> (4) Losses sustained during the taxable year and not compensated for by insurance or otherwise;
>
> * * * * *

(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence;

* * * * *

STATEMENT

This case reached the Court of Appeals of the District of Columbia on the petition of the National Industrial Alcohol Company, respondent herein, for a review of the decision of the Board of Tax Appeals redetermining deficiencies in respondent's income and profits taxes for the fiscal years ended May 31, 1919, and May 31, 1920. The record contains both the findings of the Board (R. 8–9) and a brief statement of the evidence (R. 14–19).

Before the Board, the taxpayer sought to establish the right to deductions resulting from the asserted obsolescence of good will, trade-marks and trade brands, and also of vats and a building on account of prohibition legislation. The Board disallowed the claims on account of intangible property and on account of the building, but allowed a deduction on account of the vats. (R. 10, 11.) The taxpayer alone petitioned for a review of its determination. The Court of Appeals of the District of Columbia affirmed the decision as to intangible property but held that the taxpayer was entitled to a deduction for loss sustained as to the building. (R. 28.) As the Commissioner alone applied for

writ of certiorari, the only question is as to the building, and only such facts as relate to it will be alluded to here.

The taxpayer was a corporation organized under the laws of Louisiana in 1911 for the purpose of manufacturing, bottling, and selling beer. On November 3, 1919, it abandoned the manufacture of alcoholic beer and entered upon the manufacture of "near beer." It continued this business until 1923. (R. 8.)

In August, 1921, the taxpayer began to manufacture and sell industrial alcohol, as a separate enterprise, and the buildings as to which the deduction was claimed were not used for the manufacture or sale of industrial alcohol and are not involved in this case. (R. 8, 18.)

For the manufacture of alcoholic beer the taxpayer had two brick buildings, one designated as "the brewery building" and the other as "the cellar building." After prohibition the brewery building and one floor of the cellar building were used in the manufacture of "near beer." Two floors in the cellar building and the vats contained therein were not used. (R. 9.)

The abandoned floors contained vats or tanks for the fermentation and aging of beer which apparently were not needed for the manufacture of the quantity of "near beer" which the taxpayer produced. (R. 17.)

The only deduction on account of obsolescence of buildings which the taxpayer asserted in its petition to the Court of Appeals was on account of abandonment of these two floors of the cellar building. The petition alleged that the depreciated cost of the entire building was "proven by the evidence" (R. 13), and the opinion of the Board of Tax Appeals stated that the evidence was sufficient to permit a computation to be made of this item (R. 10). But neither the Board nor the court below made such a computation.

The Board, in its opinion, said of that building of which a part was abandoned (R. 10):

> * * * there is nothing in the record to indicate that this structure was obsolete or becoming so. It is not sufficient to sustain a deduction to show only that the building can not be used in the petitioner's business. It is entirely possible that such a building was convertible for use in some other business in which refrigeration was necessary. There is no evidence that any effort was made to dispose of the building or to find any other use for it. The action of the commissioner in refusing to allow any obsolescence on the building must be approved.

The court below stated that the testimony showed that "neither of the two floors abandoned * * * had any value to appellant [the taxpayer] after November 3, 1919." (R. 27.) In the abstract of the evidence is the statement that the two floors

in the cellar building which were not used have never "had any value to the company [the taxpayer] since prohibition." (R. 18.)

The only specification of error is predicated upon the Government's contention that the statute did not permit any deduction for obsolescence caused by the proscription of a business by prohibition legislation. Consequently, we are not in a position to raise the question whether the evidence establishes obsolescence of the property in question, if it be assumed that there can be any deduction for obsolescence owing to prohibition legislation.

SPECIFICATION OF ERROR TO BE URGED

The court below erred in holding that, where tangible assets are abandoned because the business in which they are used is proscribed by prohibition legislation, the taxpayer sustains a loss for which a deduction from income may be taken under the Revenue Act of 1918, Section 234 (a) (4) or Section 234 (a) (7).

ARGUMENT

We maintain that Congress did not intend to provide compensation in any form for losses caused by prohibition legislation and that neither Section 234 (a) (4) nor Section 234 (a) (7) of the Revenue Act of 1918, *supra*, authorized the deduction claimed. The arguments in support of this position are made on pp. 9–13 of the brief for the petitioner in *Burnet, Commissioner,* v. *Niagara*

Falls Brewing Company et al., No. 61, October Term, 1930, to which reference is hereby made. Copies of that brief have been furnished to counsel for respondent herein.

CONCLUSION

The judgment of the Court of Appeals of the District of Columbia should be reversed, and the order of the Board of Tax Appeals should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
SEWALL KEY,
J. LOUIS MONARCH,
JOHN MACC. HUDSON,
Special Assistants to the Attorney General.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
ROBERT L. WILLIAMS,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel

JANUARY, 1931.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 109

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

NATIONAL INDUSTRIAL ALCOHOL COMPANY, INC.

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

R. M. O'HARA,
Counsel for Respondent,
1040 Shoreham Building, Washington, D. C.

Dated, May 24, 1930.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 887.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

NATIONAL INDUSTRIAL ALCOHOL COMPANY, INC.

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OPINION BELOW.

The opinion of the Court of Appeals of the District of Columbia (R. 35) is reported at 38 Fed. (2nd) 718. The findings of fact and opinion of the United States Board of Tax Appeals (R. 11-15) are reported in 7 B. T. A. 1241.

QUESTION PRESENTED.

The sole question presented by petitioner in his petition for a writ of certiorari is whether the depreciated cost of tangible property which is abandoned constitutes an allowable deduction from respondent's income either as a loss under Section 234 (a) (4) or as obsolescence under Section 234 (a) (7) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, 1078.

STATUTE INVOLVED.

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, 1078:

> SEC. 234 (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> * * * *
>
> (4) Losses sustained during the taxable year and not compensated for by insurance or otherwise.
>
> * * * *
>
> (7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.
>
> * * * *

STATEMENT.

Respondent accepts as correct the statement contained in the petition for certiorari.

ARGUMENT.

Respondent concedes that prior to November 3, 1919, it was engaged in the manufacture and sale of beer, and furthermore concedes that after that date it was compelled to cease the manufacture of beer because of

National Prohibition. The loss claimed by respondent represents depreciated cost of two floors of its cellar building abandoned on November 3, 1919, and having no value to respondent thereafter. In the proceeding before the Court of Appeals of the District of Columbia, respondent elected to have its rights determined under Section 234 (a) (4) of the Revenue Act of 1918, and claimed the loss as a deduction in the year of abandonment (R. 41). Petitioner, citing the decisions of this Court in Clarke v. Haberle Crystal Springs Brewing Company, 280 U. S. 384, and Renziehausen v. Lucas, 280 U. S. 387, submits that the ruling of this Court in those cases is equally applicable to deductions claimed because of the abandonment of tangible property used in a brewery business rendered illegal by the Eighteenth Amendment to the Constitution. Respondent respectfully submits that the principle in those two decisions is not controlling in this case.

In the case of Clarke v. Haberle Crystal Springs Brewing Company, *supra*, the question for decision involved the right of Haberle Crystal Springs Brewing Company to deduct as obsolescence under Section 234 (a) (7) of the Revenue Act of 1918 its good will or going concern value, such loss to be spread over the period from the date on which Prohibition became a reasonable certainty until January, 1920, the effective date of Constitutional Prohibition, rather than to be taken in the year in which the asset became obsolete. In the instant case respondent claims as a loss in the year of abandonment the depreciated cost of tangible property abandoned by respondent because of a lack of useful value after the effective date of Prohibition. The nature of such loss is the same as that resulting from the sale of property for less than its depreciated

cost, such a loss likewise being governed by Section 234 (a) (4) of the Revenue Act of 1918. Had the property been sold, surely the principle laid down by this court in Clarke v. Haberle Crystal Springs Brewing Company, *supra*, would not have prevented a deduction from income of the excess of depreciated cost over the sale price.

In the case of Renziehausen v. Lucas, *supra*, the record shows that Renziehausen continued to manufacture whiskey for medicinal purposes until November, 1921, at which time he failed to obtain a permit under the Willis-Campbell Act prohibiting such manufacture for medicinal purposes except under permit from the Commissioner of Internal Revenue. The Board of Tax Appeals disallowed Renziehausen's claim for deductions as obsolescence under Section 234 (a) (7) of the value of his good will and tangible property spread over the years 1918 to 1921, inclusive, but allowed him as a deduction in 1921 under Section 234 (a) (4) of the Act a loss on account of the abandonment of tangible property. The Circuit Court of Appeals affirmed the decision of the Board on all points. In Renziehausen's appeal before this Court he asked for a reversal of the decision of the Circuit Court of Appeals, and the allowance of the loss on abandonment of tangible property as obsolescence to be spread over the years 1918 to 1921, inclusive, instead of as a deduction in 1921, the year of obsoleteness. This Court denied appellant's contention for deductions in 1918, 1919 and 1920 on account of the obsolescence of his tangible properties, but did not disturb the allowance as a deduction in 1921 of the loss on account of the obsoleteness of those same properties. On the contrary, this Court in its decision said:

"The petitioner has no reason to complain of the allowance for obsolescence of the warehouses."

CONCLUSION.

The Commissioner of Internal Revenue needs no decision of this Court to determine the proper course to be followed in pending cases involving the same question as the instant case.

Section 234 (a) (4) of the Revenue Act of 1918 clearly permits the deduction of a loss sustained on the abandonment of property, irrespective of the circumstances from which the loss flows. Moreover, this Court in the case of Renziehausen v. Lucas, *supra*, has affirmed the decision of the Lower Court permitting a deduction under Section 234 (a) (4) on account of the obsoleteness and abandonment of physical property, thereby establishing a rule for the guidance of the Commissioner of Internal Revenue.

Respectfully submitted,

R. M. O'HARA,
Counsel for Respondent,
1040 Shoreham Building, Washington, D. C.

Dated, May 24, 1930.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 109.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

NATIONAL INDUSTRIAL ALCOHOL COMPANY, INC.,
Respondent.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR RESPONDENT.

R. M. O'HARA,
Counsel for Respondent.

January, 1931.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 109.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

NATIONAL INDUSTRIAL ALCOHOL COMPANY, INC.,
Respondent.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR RESPONDENT.

This case comes before the Court on a Writ of Certiorari granted June 2, 1930, and involves a proceeding instituted by respondent before the United States Board of Tax Appeals. The determination of the Board of Tax Appeals was reversed in part by the Court of Appeals of the District of Columbia, following which petitioner applied for and was granted a Writ of Certiorari.

OPINIONS BELOW.

Court of Appeals of the District of Columbia, Opinion, 38 Fed. (2nd) 718.

United States Board of Tax Appeals, Opinion, 7 B. T. A. 1241.

QUESTION PRESENTED.

Did Congress intend by Section 234 (a) (4) of the Revenue Act of 1918 to authorize as a deduction a loss sustained on the abandonment of tangible assets which had become valueless through prohibition legislation?

STATUTE INVOLVED.

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077:

> "Sec. 234 (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions: • • •
>
> "(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise; • • •"

STATEMENT.

Respondent adopts the statement of the case as set forth on pages 3 to 6 of petitioner's brief, with the addition of the following:

Respondent in both the petition to the Board of Tax Appeals and the petition to the Court of Appeals of the District of Columbia made alternative claims for the deduction on account of abandonment of its building, claiming either under Section 234 (a) (4) as a loss sustained during the taxable year and not

compensated for, or under Section 234 (a) (7) as obsolescence. (R. 4, 13.)

The Board of Tax Appeals refused to permit the deduction under either subsection. (R. 10.)

The Court of Appeals held that the loss was deductible but did not specify the subsection of the Revenue Act under which deductible. (R. 27.)

In this proceeding respondent elects to have its right to a deduction determined under Section 234 (a) (4) of the Revenue Act of 1918 as a loss sustained within the taxable year ended May 31, 1920, and not compensated for by insurance or otherwise.

The following facts do not appear in the record, but respondent requests that the Court take judicial notice of them.

The Joint Resolution proposing the Eighteenth Amendment to the Constitution was adopted by both houses of Congress in December, 1917. It became a part of the Constitution on January 16, 1919, although it did not become effective by its terms until a year later. The Revenue Act of 1918 was enacted into law on February 24, 1919.

SUMMARY OF ARGUMENT.

The Sixteenth Amendment to the Constitution granted to the Congress the power to collect taxes on incomes from whatever source derived, without apportionment between the States. The legislative history of the taxing statutes shows that in all Revenue Acts, including the Revenue Act of 1918, Congress specifically enumerated those classes of income not subject to tax and those items not deductible in arriving at taxable income. The Treasury Department construed the Revenue Act of 1918 as permitting

deductions representing losses sustained because of national prohibition. In neither the Revenue Act of 1918 nor in any subsequent Revenue Act did Congress include among the items not deductible losses sustained by reason of constitutional prohibition. It must therefore be presumed that the intent of Congress was to permit the deduction of such losses.

Section 234 (a) (4) of the Revenue Act of 1918 provides that there shall be allowed as deductions losses sustained during the taxable year, without in any manner whatsoever qualifying the word "losses." Under the construction given to taxing statutes by the courts, it must be presumed that Congress intended to permit the deduction of losses growing out of prohibition legislation.

ARGUMENT.

Point 1.

The legislative history of the various taxing statutes enacted by Congress under the power conferred on it by the Sixteenth Amendment to the Constitution shows that Congress in enacting the Revenue Act of 1918 did not intend to exclude from allowable deductions losses sustained as a result of prohibition legislation.

The Sixteenth Amendment to the Constitution provides that "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

In the early acts enacted by Congress under the authority of this amendment it was expressly provided what classes of income should not be subjected to tax, and what items should not be allowed as deductions.

> Act of October 3, 1913, (Revenue Act of 1913), Section B. (c. 16, 38 Stat. 166.)
>
> Act of September 8, 1916, (Revenue Act of 1916), Title I, Part II, Sections 4, 5, 11 and 12. (c. 463, 39 Stat. 756.)
>
> Act of October 3, 1917, (Revenue Act of 1917), Title I, Sections 3 and 4. (c. 63, 40 Stat. 300.)

On January 16, 1919, the Eighteenth Amendment became a part of the Constitution, prohibiting the manufacture, sale or transportation of intoxicating liquors. On February 24, 1919, or thirty-nine days thereafter, there was enacted into law a new Revenue Act known as the Revenue Act of 1918. (c. 18, Title II, 40 Stat. 1057.) It is under Section 234 (a) (4) of the Revenue Act of 1918 that the loss here in question is claimed.

Following the legislative precedent established in the enactment of the three prior Revenue Acts, Congress, in the Revenue Act of 1918, again made specific provision as to those classes of income not subject to tax and those items not deductible. Section 213 of the Act defined gross income in the case of an individual, and in subsection (b) thereof enumerated those specific classes of income not subject to tax. Section 233 defined gross income in the case of a corporation and provided that gross income meant the gross income as defined in Section 213 ex-

cept for certain other and additional classes of income not subject to tax.

Section 214 provided what deductions should be allowed to an individual in computing net income, and Section 215 listed those items not deductible in the following language:

> "SEC. 215. That in computing net income no deduction shall in any case be allowed in respect of—
>
> "(a) Personal, living, or family expenses;
>
> "(b) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;
>
> "(c) Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made; or
>
> "(d) Premiums paid on any life insurance policy covering the life of any officer or employee, or of any person financially interested in any trade or business carried on by the taxpayer, when the taxpayer is directly or indirectly a beneficiary under such policy."

The list of items not deductible under the Statute did not include losses resulting from prohibition legislation.

Section 234 of the Act enumerated those deductions which should be allowed in computing the net income of a corporation; and Section 235, instead of listing those items not deductible to a corporation, referred back to Section 215 and provided:

> "That in computing net income no deduction shall in any case be allowed in respect of any of the items specified in Section 215."

It should be noted that the Revenue Act of 1918, which mentions specifically those items not deductible but did not include therein losses from prohibition legislation, was enacted thirty-nine days after the Eighteenth Amendment had become a part of the Constitution.

Early in the administration of the Revenue Act of 1918 the Treasury Department was called upon to pass on the deductibility of losses to brewers and distillers resulting from prohibition legislation; and, construing the Act as justifying the deduction of such losses, the Department in 1919 promulgated Article 143 of Regulations 45, providing in part as follows:

> "ART. 143. Loss of useful value.—When through some change in business conditions the usefulness in the business of some or all of the capital assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in the business, he may claim as a loss for the year in which he takes such action the difference between the cost or fair market value as of March 1, 1913, of any asset so discarded (less any depreciation sustained) and its salvage value remaining. This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires proof of some unforeseen cause by reason of which the property must be prematurely discarded, as, for example, where an increase in the cost of or other change in the manufacture of any product makes it necessary to abandon such manufacture, to which special machinery is exclusively devoted, *or where new legislation directly or indirectly makes the continued profitable use of the property impossible.* * * *" (Italics ours)

This article has been retained practically without change in regulations promulgated under all of the subsequent Revenue Acts.

Article 143, Regulations 62 (promulgated in 1922) Revenue Act of 1921.
Article 143, Regulations 65 (promulgated in 1924) Revenue Act of 1924.
Article 143, Regulations 69 (promulgated in 1926) Revenue Act of 1926.
Article 173, Regulations 74 (promulgated in 1929) Revenue Act of 1928.

From 1919 until the decision of this Court in Clarke v. Haberle Crystal Springs Brewing Company (280 U. S. 384), the Treasury Department construed the Revenue Act of 1918 as permitting the deduction of losses resulting from prohibition legislation. That construction of the Department was affirmed by the United States Board of Tax Appeals and the Courts.

In early rulings the Treasury Department approved in principle the deductibility of such losses, even as extended to intangibles, and prescribed rules for the computation of the loss and the method of charging it against income. Illustrative of such rulings are the following:

T. B. R. 44, 1 C. B. 133. (promulgated in 1919)
L. O. 862, 1 C. B. 127. (promulgated in 1919)
A. R. M. 34, 2 C. B. 31. (promulgated in 1920)

In various specific instances the Treasury Department, the Board of Tax Appeals and the Courts have allowed deductions for losses resulting from prohibition legislation, in the year in which the property was abandoned.

O. D. 125, 1 C. B. 133. (promulgated in 1919)
A. R. R. 6349, III-1 C. B. 148. (promulgated in 1923)
Appeal of Zakon, 7 B. T. A. 687. (decided in July, 1927)
McAvoy Company v. Commissioner, 10 B. T. A. 1017. (decided in February, 1928)
Sheffield Dentifrice Company v. Commissioner, 13 B. T. A. 877. (decided in October, 1928)
Dean v. Hoffheimer Brothers Company, 29 Fed. (2nd) 668. (decided in December, 1928)

After the Treasury Department had construed the Revenue Act of 1918 as permitting such deductions, and after that construction had been approved by the Board of Tax Appeals, Congress enacted new Revenue Acts known respectively as the Revenue Acts of 1921, 1924, 1926 and 1928. In all of those later Revenue Acts, Congress followed the precedent theretofore established, enumerating specifically those items not deductible; but in the case of no one of those later Revenue Acts did it include among those items not deductible, losses sustained as a result of prohibition legislation.

Act of November 23, 1921 (Revenue Act of 1921), Title II, Sections 215 and 235 (c. 136, 42 Stat. 227).
Act of June 2, 1924 (Revenue Act of 1924), Title II, Sections 215 and 235 (c. 234, 43 Stat. 253).
Act of February 26, 1926 (Revenue Act of 1926), Title II, Sections 215 and 235 (c. 27, 44 Stat. 9).
Act of May 29, 1928 (Revenue Act of 1928), Title I, Section 24 (c. 852, 45 Stat. 791).

The foregoing legislative history of income tax legislation and of the construction of the 1918 Act

by the Treasury Department and the Board of Tax Appeals, precludes a finding that Congress intended to exclude from the class of allowable deductions, losses sustained from prohibition legislation.

> In Section 234 of the Revenue Act of 1918, Congress provided for certain deductions from the gross income of corporations, and included "losses sustained during the taxable year and not compensated for by insurance or otherwise"; it also, in Sections 215 and 235 of that Act, mentioned specifically those items which did not constitute deductions.
>
> The Treasury Department, prior to the enactment of the next succeeding Revenue Act (Revenue Act of 1921) construed those sections of the Revenue Act of 1918 as permitting a deduction for losses sustained as a result of prohibition legislation, and held to that construction until the decision of this Court in Clarke v. Haberle Crystal Springs Brewing Company, *supra*. That construction was approved by the Board of Tax Appeals and the Federal Courts.
>
> In all of the subsequent Revenue Acts, namely, the Revenue Acts of 1921, 1924, 1926 and 1928, Congress reenacted practically without change those provisions covering deductions contained in Sections 234, 215 and 235 of the Revenue Act of 1918.

The reenactment by Congress in the later Revenue Acts without substantial change of those sections of the Revenue Act of 1918 which had continuously been construed by the executive department as permitting a deduction for a loss such as in the case at bar is an adoption by Congress of such a construction. (U. S. v. Falk, 204 U. S. 143; U. S. v. Cerecedo *et al.*, 209 U. S. 337; National Lead Company v. U. S., 252 U. S. 140)

Point 2.

The broad language of Section 234 (a) (4) of the Revenue Act of 1918 permits the deduction of losses sustained by reason of national prohibition legislation.

Section 234 (a) (4) of the Revenue Act of 1918 provides that there shall be allowed as deductions

> "losses sustained during the taxable year and not compensated for by insurance or otherwise"

Neither in the Revenue Act of 1918 nor in any subsequent act did Congress provide specifically that losses sustained through prohibition legislation were not deductible. Such losses, therefore, are deductible unless they do not fall within the deductions provided for by Section 234 (a) (4).

The language of the statute, so far as it concerns the word "losses" is without any qualification or restriction. The only requirement as a prerequistie to the deduction is that the losses be (1) sustained during the taxable year, and (2) not compensated for by insurance or otherwise.

This Court has said, in construing the word "property" found in Section 12 (a) of the Revenue Act of 1916,

> "There is nothing to suggest that the word 'property' is used in any restricted sense." Lynch v. Alworth-Stephens Company, 267 U. S. 364.

What was said by this Court in that case with respect to the word "property" is equally applicable here with respect to the word "losses" as it appears in Section 234 (a) (4).

The use of the word "losses" in Section 234 (a)

(4) without restriction, limitation or qualification, leaves no room for doubt as to the intent of Congress in providing for the deduction of all losses except those specifically enumerated as not deductible. It is not therefore necessary to invoke the rule established by this Court that in the case of taxing statutes any doubt which exists as to the intent of Congress should be resolved against the Government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151; U. S. v. Wigglesworth, 2 Story 369; Benziger v. U. S., 192 U. S. 38; American Net and Twine Company v. Worthington, 141 U. S. 468.

CONCLUSION.

The loss claimed by respondent was sustained on the abandonment of its property on November 3, 1919, during the fiscal year ended May 31, 1920, and was not compensated for by insurance or otherwise. The statute specifically enumerates those items not deductible, and such enumeration does not mention losses sustained through prohibition legislation. In defining losses that are deductible the statute provides without restriction for the deduction of losses sustained during the taxable year and not compensated for by insurance or otherwise.

The decision of the Court of Appeals of the District of Columbia should be affirmed, and there should be allowed to respondent as a deduction from income in the taxable year ended May 31, 1920, the loss sustained by it through the abandonment of its tangible property as a result of prohibition legislation.

Respectfully submitted,

R. M. O'Hara,
Counsel for Respondent.

January, 1931.

SUPREME COURT OF THE UNITED STATES.

No. 109.—October Term, 1930.

David Burnet, Commissioner of Internal Revenue, Petitioner, *vs.* National Industrial Alcohol Company, Inc.	On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[February 24, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

The Board of Tax Appeals affirmed the Commissioner's determination of deficiencies in respondent's income and profits taxes for fiscal years ending May 31, 1919, and 1920. The taxpayer claimed allowances for obsolescence, resulting from prohibition legislation, of a part of a building. It was denied. 7 B. T. A. 1241. The Court of Appeals reversed. 38 F. (2d) 718.

The taxpayer, a Louisiana corporation organized in 1911, was engaged in making and selling beer. November 3, 1919, it abandoned that business and commenced the manufacture of near beer which it continued until 1923. For the manufacture of beer the taxpayer had a brewery building and a cellar building having three floors. After prohibition the brewery building and one floor of the cellar building were used in the production of near beer. Two floors of the cellar building and certain steel and wooden vats thereon formerly used for aging beer were not needed and their use was discontinued on November 3, 1919. The Board found that the vats had no salvage value and held their depreciated cost deductible as obsolescence over the period from December 18, 1917, the date of the submission of the Eighteenth Amendment, to January 16, 1920, the date that prohibition took effect. But it denied any allowance for obsolescence of the two floors on the ground that, while the taxpayer ceased to use them, there was nothing in the record to indicate that the structure was obsolete or becoming so. The Court of Appeals held the evidence ample to support the taxpayer's contention that after abandonment the two

floors possessed no residual or salvage value. The Government has raised here only the question whether under the Revenue Act of 1918, § 234 (a) (4) or (a) (7) a deduction may be allowed for loss or obsolescence of tangible property caused by prohibition legislation, and concedes that it is not in position to contend that the evidence was not sufficient to establish obsolescence of the two floors.

The Government relies on *Clarke* v. *Haberle Brewing Co.*, 280 U. S. 384, and *Renziehausen* v. *Lucas*, 280 U. S. 387. But we have held in the *Gambrinus* case just decided that under § 234 (a) (7) a brewing company is entitled to allowance for obsolescence of its building that was caused by the imminence and taking effect of prohibition. That case rules this one.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.